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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 433

CITY OF GAINESVILLE, PETITIONER,

vs.

BROWN-CRUMMER INVESTMENT COMPANY, SOUTHERN SURETY COMPANY, AND H. O. HEAD, EXECUTOR OF H. W. HEAD, RESPONDENTS.

PETITION FOR CERTIORARI.

To the Supreme Court of the United States:

Gainesville is a Texas city of exceeding five thousand inhabitants, incorporated under a special act of the legislature of which the courts take judicial notice. The Southern Construction Company, a partnership, hereafter called the Construction Company, did some paving in Gainesville under a contract, by which it was to look to the abutting lot owners for their *pro rata* of the costs, but to accept city treasury warrants at par

for the city's part (140). The statement in the opinion that the warrants were taken by the Construction Company at a discount of 5 per cent is error. The city was to pay 90 per cent of its *pro rata* of the cost as the work progressed, upon estimates approved by the engineer, reserving the remaining 10 per cent until the completion of the work (156). The city's *pro rata* of the contemplated work was supposed to be around $50,000. The Construction Company did paving, the city's part of which was $3,000. This was accepted, the warrants issued, and they have since been paid. Before any other paving was done, warrants for the additional sum of $47,000 were issued, pursuant to resolutions falsely reciting that the paving had been completed, inspected and accepted, when nothing had in fact been done. One of these resolutions passed on the 21st of September, 1920, provided for the issuance of ten $1,000 warrants to the Southern Construction Company, numbered 41 to 50, inclusive (171). Another resolution passed on October 5, 1920, authorized the issuance of seventeen $1,000 warrants to the Construction Company, numbered 34 to 40, inclusive. On November 2, 1920, another resolution was passed directing the issuance of ten $1,000 warrants to the Construction Company, numbered 14 to 23, inclusive (172). Another resolution was passed on November 16, 1920, directing the issuance to the Construction Company of ten $1,000 warrants, numbered 4 to 13, inclusive (172). At the time of the issuance of these warrants the paving which they were intended to represent had not been laid, nor had the ground been broken. There were no

engineers' estimates, nor had anything been inspected, accepted or received. The recitals were untrue.

H. W. Head, on September 10, 1920, executed to the city of Gainesville, his obligation reciting that under an order from the Construction Company any moneys due from the city of Gainesville were to be paid to him, said moneys being payable in warrants, and that he understood it was the purpose of the city council to have issued to the Construction Company $10,000 in warrants, which were to be properly indorsed by the Construction Company and delivered to him. And in the event of any dispute, discrepancy or other contingency arising which might in any way affect the amount of work done or materials furnished by the Construction Company so as in any way to affect the $10,000 warrants, he agreed to protect and indemnify the city up to the sum of $10,000 (12). And further reciting that none of said moneys will be paid or credited to the Construction Company except in such amounts as may be shown to be due under the signature of the mayor of Gainesville, and when such amounts should equal $10,000, then the obligation to be discharged (13). On the 4th of October, 1920, H. W. Head executed to the city of Gainesville an additional obligation, in substance the same as the first, except it contemplated the issuance of $37,000 additional warrants, and bound himself to make good to that amount (15). The Southern Surety Company guaranteed each of the above obligations. After the passage of these resolutions, the Construction Company did no more paving until 1921, when it did paving which was ac-

cepted and received by the city, amounting to $31,735.29, leaving $15,264.71 worth of paving undone. After doing this paving, the Construction Company abandoned the work (183).

The city brought suit in the District Court for Cooke County, Tex., against the Southern Construction Company, H. W. Head and the Southern Surety Company to recover the difference between the paving it had received and the paving it had paid for; and in the same suit prayed for judgment against the Construction Company individually for gravel and materials furnished, and for hire of teams and some other things. Judgment by default was rendered against the three defendants for $15,000, and against the Construction Company for $4,090 (120). This judgment was reversed on appeal as to Head and the Surety Company. Head *vs.* City of Gainesville, 254 S. W., 323. The opinion of the circuit court of appeals is incorrect in saying that the judgment for $15,000 was against only two of the defendants. It was against all of the defendants, and, in addition to that, an individual judgment was rendered against the Construction Company for $4,090, which has never been paid. In the meantime H. W. Head died, and, upon the remand of the case to the State district court, his executor answered, questioning the validity of the warrants, claiming that they were illegal and void. It was then that the city made the Investment Company, the holder of the warrants, a party to the suit, praying that in case the warrants were held to be illegal and void that they be so declared. The city was thus seeking to bind

the Investment Company by the judgment. The Investment Company petitioned for the removal of the case to the District Court of the United States for the Eastern District of Texas, and that court overruled a motion to remand. Afterward the pleadings were recast. The amended petition alleging all the facts relating to the contract, the issuance of the warrants, the shortage in the paving and the obligation of H. W. Head and the Surety Company, and praying for judgment against the Surety Company and H. W. Head's estate for the difference between the paving done and the paving paid for, but asking that if the warrants be invalid they be so adjudged. H. W. Head's estate and the Surety Company alleged the warrants were invalid and the reason why they were invalid. The Investment Company, by cross answer, sought to recover on the warrants then past due and some unpaid interest on the other warrants. The city, in reply to this cross answer, alleged all the facts connected with the transaction and that it received no consideration for $15,-264.71 of the warrants, and that the warrants sued on were the last issued, and asked that if the warrants are held invalid for judgment so declaring, but if valid that it have judgment against Head's estate and the Surety Company for $15,264.71, as the difference between the paving received and the amount of the warrants, with interest. The case being tried before a jury, the court directed a verdict in favor of the Surety Company against the city for $13,125.40, and that the city take nothing as to Head and the Southern Surety Company, and rendered judgment accordingly (227

and 122). The city carried the case by writ of error to United States Circuit Court of Appeals, Fifth Circuit, which court, on July 6, 1927, affirmed the judgment in favor of the Investment Company against the city, but held it had no jurisdiction of the controversy between the city and the estate of H. W. Head and the Southern Surety Company.

The circuit court of appeals was in error in saying that the city retained 10 per cent when it issued the warrants complanied of. It is true the contract required the city to retain 10 per cent, but it did not do so, but issued warrants for the full amount of work the Construction Company was to do, retaining nothing, thus paying in full for the work before it was done (166 to 189).

The opinion says that the warrants in question were delivered to H. W. Head in escrow. The warrants were issued pursuant to resolutions reciting that they were in payment of indebtedness to the Construction Company and directing their delivery to that company. The Construction Company indorsed the warrants and delivered them to H. W. Head, who delivered them to the Investment Company when it paid for them. There was evidently some outside understanding, not shown on the records of the city, contemplating that Head should use the proceeds of the warrants in paying for the work that was to be done, and his obligation was that the city should receive the $47,000 of paving that it had paid for.

The opinion says that assuming the deficiency in the work was approximately $15,000, still the city had

ample security for that amount. The Construction Company was insolvent. The charter, the instruction to bidders and the bid itself required a construction bond in the amount of the contract. The statute required, in addition to this, the usual penal bond conditioned to pay for the work and material. The contract contemplated the expenditure of exceeding $150,000, yet we find the only bond given was in the sum of $5,000 (164). The instructions to bidders (133) and the bid (134) required the Construction Company to execute a bond to maintain the work for five years, but no such bond was given. The United States District Court instructed a verdict in favor of Head and the Surety Company, doubtless upon the ground that the bond was unenforceable. In what way could the circuit court of appeals reach the conclusion that Gainesville had ample security for the $15,264.71?

There is no question but that the pleadings, requested instructions, exceptions to the charge, and specification of error are sufficient to raise the question sought to be reviewed.

I.

The so-called treasury warrants in question are in fact bonds, and void because the qualified voters of Gainesville did not give their consent to their issuance at an election held for that purpose. Section 1, Article 4, of the charter prohibits the issuance of bonds in excess of $2,500 unless a majority of voters shall give their consent thereto at an election held for that purpose (128). Article 701 of the Revised Statute

says, "The bonds of an incorporated city or town shall never be issued for any purpose unless the proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property taxpayers of such city or town." This statute overrides the provisions of the charter. City of Beaumont *vs.* Fall, 291 S. W., 202. In the recent case of A. F. Pulte *vs.* J. Z. Keel, Mayor, *et al.*, not yet reported, the Court of Civil Appeals for the Second Texas District held that obligations, in no respect different from the warrants in question, attempted to be issued by the City of Gainesville, were in fact bonds and void, because the tax-paying voters did not give their consent thereto at an election held for that purpose. That holding is directly in conflict with the opinion of the circuit court of appeals in the present case. The charter of the City of Waco is not materially different from that of Gainesville. In Foster *vs.* City of Waco, 255 S. W., 1104, the Texas Supreme Court held that promissory notes executed by the city for land bought for cemetery purposes were void because not authorized at an election held for that purpose.

The form of the warrants in question is given on page 245 of the printed record. It says:

> "This is to certify that the City of Gainesville, County of Cooke and State of Texas, for value received, is justly indebted and promises to pay to The Southern Construction Company, Contractor, their assigns or bearer, on the 1st day of March, 19—, at the offices of The Brown-Crummer Investment Company, Wichita, Kan-

sas, the sum of One Thousand Dollars in lawful money of the United States of America, with interest thereon from date hereof until paid at the rate of 6 per cent (6%) per annum, payable on the 1st day of March, 1920, and semi-annually thereafter on September 1st and March 1st of each year; and the City Treasurer is authorized, ordered and directed to pay to the said Southern Construction Company, their assigns or bearer, said principal sum, together with interest payable at the place above named, upon presentation and surrender of warrant or proper coupon."

The direction to the treasurer to pay does not add to or take from the instrument or change its essential character. But for the inhibition against the issuance of bonds, this instrument would doubtless have been called a bond, and the evident purpose was to evade the inhibition against the issuance of bonds.

II.

The removal of the suit to the Federal court upon the petition of the Investment Company, a citizen of Kansas, if removable, carried the entire case, and the circuit court of appeals should not have refused to take jurisdiction of the controversy between the City of Gainesville and the Surety Company and the Head estate. Section 28, J. C., says: "may remove said suit into the District Court of the United States for the proper district." The statute has not been changed since the decision in Barney *vs.* Latham, 103

U. S., 205 and 212. In Hamilton *vs.* Empire Gas and Fuel Company, 297 Fed., 429, it was held that the removal of a separable controversy carried the whole case into Federal court. To the same effect is Cornell *vs.* Smiley, 256 U. S., 341, and Brooks *vs.* Clark, 119 U. S., 502. There seems to be a conflict between the holding of this court and the Circuit Court of Appeals for the Fifth Circuit. If the circuit court of appeals believed it was without jurisdiction of the controversy between the City of Gainesville on the one part and the Surety Company and the Head estate on the other, it should have directed its remand to the State court and not its dismissal.

III.

It is a question whether the paving contract and the proceedings thereunder are void because of the failure of the council to comply with the mandatory provisions of the charter and the statute. The limitation on the power of boards of aldermen to incur indebtedness binding upon the municipality is nowhere more clearly stated than in the opinion of Judge Fields in Zortmann *vs.* San Francisco, 20 Cal., 96; 81 Am. Dec., 96, and note page 107. In Texas these limitations are so fully recognized that a petition against a municipality seeking to enforce a contract is demurable unless it clearly sets forth the facts and circumstances authorizing the contract. American Roads Machinery Co. *vs.* City of Ballinger, 210 S. W., 265. McNeal *vs.* City of Waco, 89 Tex., 83; 13 S. W., 322. Articles 544 to 547 of the Revised Statutes, now Articles 1082 to

1085, inclusive, of the present statutes, were incorporated into the charter of Gainesville (130). It is prescribed in Article 1083 that when a council shall determine to make any street improvement, the council shall cause estimates to be made of the probable costs thereof by the city engineer and by some other officer of the city, or by a committee of three aldermen. This was not done, and rendered the attempted contract void. Frosh *vs.* City of Galveston, 73 Tex., 401; and City of Corsicana *vs.* Kerr, 89 Tex., 461; 35 S. W., 794.

Section 28, Article 2, of the charter prescribes that all contracts pertaining to public improvements involving as much as $250 shall be based upon specifications prepared, submitted to and approved by the mayor and city council, and after such approval, advertisement for the proposed work shall be made, inviting competitive bids for the work to be done (125). No specifications or plans were ever submitted to or approved by the council prior to the building. Section 28 of Article 2 also provides that all bids shall be sealed and shall be opened by the mayor in the presence of a majority of the aldermen, and shall remain on file in the mayor's office, open for public inspection, at least forty-eight hours before any award is made to any competitive bidder (127). This was not done, but the contract was awarded within twenty-four hours after the bids were opened. The instruction to bidders apprised them that a construction bond would be required in the full amount of the contract, and that a bond for the maintenance of the work for five years

would be exacted. The bid of the Construction Company was accepted twenty-four hours after it was opened, leaving off the maintenance bond and the construction bond, and providing, in lieu of the construction bond, the putting up of $5,000 in collateral satisfactory to the council (164). This was done in disregard of Section 29, Article 2, of the charter, saying that the council shall require a good and sufficient construction bond of all contractors, with at least two good and sufficient securities (127); and Article 5160 of the Revised Statute, saying there shall be required of the contractors before commencement of the work the usual penal bond, with the additional obligation that such contractor shall promptly make payment to all persons supplying him or them with labor and material in the prosecution of the work provided for in such contract. The contract and specifications provided that in the construction of the work the contractor should give preference in employment to the citizens of Gainesville, and when such citizens are not available preference should be given citizens of the United States (146). In no matter relating to this contract did the council get within hailing distance of the law.

IV.

The next contention is that by instructing a verdict in favor of the Investment Company the district judge invaded the province of the jury and denied to the city of Gainesville a right guaranteed by the Seventh Amendment to the Constitution of the United States.

A suit upon city warrants, to which is interposed the defense of want or failure of consideration or of lack of authority to issue the warrants, is a case at law. If by estoppel an invalid warrant can be made binding (Dillon 857), that law cannot aid the Investment Company. The evidence is sufficient to show that the Investment Company kept in touch with the proceedings from the beginning to the end and is the author of the scheme by which invalid warrants were made to appear valid by false recital in ordinances and resolutions. On November 19, 1919, the day the contract was signed, the Investment Company, through its agent, J. E. Blain, contracted to purchase the warrants from the Construction Company at $.95 on the dollar (207). The Construction Company immediately employed Harris, McCall & Graham to look after the proceedings. It should be presumed that Harris, McCall & Graham informed themselves in reference to what had been done, in order to qualify themselves to pass upon its validity. On December 15, 1919, these attorneys, Harris, McCall & Graham, wrote to the city secretary inclosing the form of an ordinance relating to the contract and providing for the issuance of warrants. The attorneys sent two copies and requested the secretary to return one of them properly certified (209). The ordinance was passed without any change. It contains many false recitals, such as an estimate of costs had been made and plans of specifications approved, and that the bids, after being opened, had remained on file for forty-eight hours

before the contract was awarded. In other words, the resolution recited, not what had been done, but what should have been done in order to make the contract valid. The Construction Company had agreed to accept warrants at par, which meant face value and accrued interest. On January 2, 1920, Harris, McCall & Graham wrote to J. E. Blain, the Investment Company's agent, calling his attention to two corrections which they desired made in the ordinance which they had sent and which had been passed and approved on December 16, 1919. They said that they had made the corrections in their copy, and for Blain to see that the same changes were made in the original record (210). The so-called copy that Harris, McCall & Graham had was the original of the ordinance which had been passed. The changes thus made after the ordinance had been passed and approved entitled the Construction Company to the interest accruing from November 20, 1919, until the delivery of the warrants a year afterwards, which interest found its way to the Investment Company. On June 18, 1920, the Investment Company, through its agent, J. E. Blain, secured from the city an agreement by which the city was to pay to it 5 per cent on all warrants issued to the Construction Company, and in which the Investment Company agreed to furnsh the legal proceedings for their issuance to the Southern Construction Company (205).

After this J. E. Blain and Harris, McCall & Graham took charge of the matter and the council did whatever they were requested to do. The fraudulent resolution

for the issuance of the warrants was prepared in Dallas in duplicate, or triplicate, by Harris, McCall & Graham, and were brought to the city council by J. E. Blain, the Investment Company's agent, together with false affidavits already prepared by Harris, McCall & Graham for the aldermen and city officials to make, to the effect that recitals in the resolutions were true (166). Certificates showing that the original was a true copy was already prepared so that the secretary had nothing to do except "sign here." These resolutions were passed at night, and upon most occasions the mayor was absent on account of sickness. On these occasions, upon the adjournment of the council, Blain and Levy, a member of the Construction Company, would carry the resolutions and warrants to the mayor's residence and there have him to sign them (184). Blain knew that the paving had not been done (216). J. E. Blain was not produced as a witness, nor was any member of the firm of Harris, McCall & Graham, or reason shown for their non-production. It is true that R. E. Crummer, the vice-president and active head of the company, testified that he knew nothing except what the warrants and resolutions show, but he was deeply interested in the transaction and in some respects his evidence is shown not to be true. He testified that he did not know what was in the contract between the city and the Construction Company and that he could not say that the expression, "work performed and material furnished," struck him as somewhat peculiar, and that he presumed that

the city officials prepared the resolution (196). On June 17, Blain wired the Investment Company to know "how much more discount we need on Gainesville warrants and to give all suggestions they can" (203). The Investment Company replied, "We should have at least 5 per cent reduction. Call attention to provisions of contract that work should be completed in 180 working days" (203). J. E. Blain continued to act for the Investment Company. As warrants were issued and turned over by Head to the Investment Company, J. E. Blain was on hand to collect from the city the 5 per cent (208). Whenever the Investment Company wanted anything done in reference to the matter, it called upon Blain.

There was no engineer's estimate, but the resolution contained a statement signed by the Construction Company to the effect that the city was indebted to it for work and material to the amount of ten or seventeen thousand dollars, as the case was, but not described more definitely than by the term "work and material."

V.

The next contention is that there was no separable controversy authorizing the removal to the District Court of the United States, and the Federal court did not acquire jurisdiction. The suit was an action at law by the city against the Construction Company, H. W. Head and the Surety Company to recover money claimed to be due. When Head's executor interposed the defense that the warrants were invalid and of no

value, the city contending that they were valid, made the Investment Company a party defendant in order to bind it by the judgment, under the liberal rules prevailing in Texas. Head's estate and the Surety Company claimed nothing of the Investment Company and the Investment Company claimed nothing of them. The city claimed nothing of the Investment Company except in the event that warrants were held to be illegal, but in that event that they be so declared. In Texas since the beginning, legal and equitable causes of action may be combined, and the parties, whether praying for legal or equitable relief, were entitled to a trial by jury. (Revised Statutes, Art. 2003.) Pleadings need not be consistent, but every party, whether plaintiff or defendant, can assert inconsistent claims in the same petition or answer. Section 28, *J. C.*, says:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States for the proper district."

VI.

The holding of the circuit court of appeals in reference to the validity of the warrants is in conflict with the decision of the Texas Court of Civil Appeals in A. F. Pulte *vs.* J. Z. Keel, Mayor, *et al.*, and in con-

flict with the decision of the Texas Supreme Court in the case of Foster *vs.* the City of Waco, 255 S. W., 1104. It is also in conflict with the uniform rule in Texas, and of this Court in Wall *vs.* the County of Monroe, 104 U. S., 74; the Mayor *vs.* Ray, 19 Wallace, 468, to the effect that treasury warrants are not negotiable under the law merchant, and the holder takes subject to any defense which the municipality may have. The holding of the circuit court of appeals to the effect that the entire case was not removed to the Federal court, and that it acquire jurisdiction of nothing except the controversy between the city and the Investment Company, is in conflict with the decisions of this Court and other Federal courts, such as Barney *vs.* Latham, 103 U. S., 205 and 212; Hamilton *vs.* Empire Gas and Fuel Company, 297 Fed., 429; Cornell *vs.* Smiley, 256 U. S., 341; Brooks *vs.* Clark, 119 U. S., 502. The holding of the circuit court of appeals is also in conflict with the decision of the Supreme Court of Texas and with the uniform rule that boards of aldermen have no general authority to bind the city by contract and can only do so at the time and in the manner authorized by law. Frosh *vs.* City of Galveston, 73 Tex., 401; and City of Corsicana *vs.* Kerr, 89 Tex., 461, and 35 S. W., 794, and many other cases. The question is one of general public interest in Texas and in nearly every other State, and if the ruling complained of is law, then there are no restrictions upon the power of boards of aldermen to anticipate and squander the revenue of future years. The

case involves the right of trial by jury, guaranteed by the Seventh Amendment to the Constitution of the United States, for if, in a case like this, where the unquestioned proof shows, or at least is sufficient to justify the conclusion that the scheme to defraud the taxpayers was devised by the purchaser of the warrants and its agents, and that they knew the real facts, then the supposed right of trial by jury is a delusion.

VII.

Petitioner attaches hereto a transcript of the record in the case, including the proceedings in the circuit court of appeals, and prays that this petition be granted and the cause removed to this Court for correction of the errors complained of.

CECIL MURPHY,
W. O. DAVIS,
Counsel for Petitioner.

ARGUMENT.

A decent regard for the welfare of those who come after demands that if municipal boards be given the right to anticipate and squander the revenue of future years, that such right be hedged with limitations and restrictions as has been done in Texas. Bonds cannot be issued without the consent of the qualified tax-paying voters given at an election held for that purpose. They cannot run for a longer period than forty years or bear interest at a greater rate than 5 per cent or be sold for less than par. They cannot exceed a stated per cent of assessed values. They must be submitted to the attorney general, accompanied by statements of the other indebtedness of the municipality, the annual expenses of municipal government, and assessed values as shown by the tax rolls and the tax rate. To be of any validity, they must be approved by the attorney general and registered in the office of the comptroller. Thus precautions are taken to secure fairness, deliberation and wise action looking to the interest of citizens as well as investors. A sinking fund sufficient to pay the bonds is provided and safeguarded. At the time these restrictions upon bonds were enacted, warrants such as are involved in this suit had never been used. They are a thing of recent years, devised to evade the inhibition against bonds. If they are valid, then there is no limitation as to interest except the statute against usury. There is no limitation as to time except the constitutional requirement of a sinking fund of at least 2 per cent.

There is no limitation as to the amount. The entire revenue of future years can be anticipated and nothing left for other purposes. Can the law be thus nullified by calling a bond a warrant? Any long-time paper to be paid out of the revenue of future years is a bond within the meaning of the statute. This is the effect of the recent decision of the Texas Supreme Court in Foster *vs.* City of Waco, 255 S. W., 674, and of the court of civil appeals in Pulte *vs.* Keel, not yet reported.

The section of the charter in reference to its provisions being liberally construed and doubts solved in its favor does not and cannot do away with the general rule of construction in relation to powers granted to municipalities. Section 53, Art. 3, of the State constitution says the legislature shall not pass any special law regulating the affairs of cities, towns or wards.

Section 5 of Art. 11 of the State constitution, in force at the time of granting this charter, said, "Cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the legislature." Gainesville was incorporated as a city of 10,000. The constitution has since been amended so as to read 5,000, and a self-governing amendment has been adopted. It has been held in Texas that power granted to the legislature to charter a city by a special act does not carry with it the power to incorporate special legislation therein inconsistent with the general law and policy of the State, for that would be special legislation forbidden by the Constitution. In a special act granting a charter, the rules of evidence

cannot be changed, nor can the rules for construing statutes be modified or anything incorporated inconsistent with general law. City of Beaumont *vs.* Fall, 291 S. W., 202. "Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the municipality and the power is denied." City of Brenham *vs.* Brenham Water Company, 67 Tex., 542, cited with approval in Ennis Water Works *vs.* City of Ennis, 233 U. S., 656. Anything contained in the special act changing this rule and making it applicable to a particular city would be special legislation.

The suit was an action at law brought by the city against Head and the Southern Surety Company to recover on a written obligation executed by Head and guaranteed by the Surety Company. Head alleged that the warrants concerning which the obligation was given were illegal, void and of no value, hence the city suffered no damage. The city, still asserting that the warrants were valid, made the Investment Company a party, asking that in case the warrants were ascertained to be invalid that they be so declared or annulled. This was the condition of the record at the time of the removal to the Federal court. There was no controversy between the city and the Investment Company which could be tried in the absence of Head. The city sought to have the Investment Company bound by the result of its suit against Head. If Head and the Southern Surety Company were left in the State court, then nothing was carried to the Federal court that could be there tried, especially before the

final termination of the controversy between the city and Head. This shows that either the case should not have been removed to the Federal court or that the entire case was carried there. In any event, the question is of serious import to litigants in the Fifth Circuit, and a ruling in conflict with the decisions of this court and of other circuit courts of appeals should be reviewed.

In the letting of the paving contract not a single provision of the statute or charter was complied with. Under the decisions of Texas construing the statutory provisions in question, long before this contract was let, the failure to observe statutory requirements in paving contracts render them and the proceedings thereunder void. This has become a settled rule of decision in Texas, and the question is one of vital importance to every municipality in the Fifth Circuit. A decision like the one complained of, to the effect that boards of aldermen can disregard statutory requirements and do as they please with the public business, should not stand, to invite future disregard of the law.

Judge Dillon, Volume II, Section 857, says: "A municipal corporation is not estopped, after a warrant upon its treasury has been issued, to set up the defense of *ultra vires*, or fraud, or want or failure of consideration." This statement of the law cannot be questioned. The recitation of an audit or the statement of the amount, or that it is owing, contained in a warrant does not furnish the basis for an estoppel, for all warrants contain statements of that kind. A recitation in a non-negotiable obligation is not a thing upon which a purchaser can rely. Every I. O. U. con-

tains a representation, but not one upon which the purchaser can rely. Aside from everything else, the city received no consideration for $15,264.71, or at least to that extent the consideration has failed. The estoppel rests alone in the evidence of R. E. Crummer, the vice-president and manager of the Investment Company. It is true he testified that he relied upon the representations contained in the warrants and the resolutions directing their issuance. Mr. Crummer has a pecuniary interest in the transaction. Since the morning of time, interest has discredited and sometimes disqualified a witness. The maxim "*Falsus in uno, falsus in omnibus*" applies here. He said in one place that he had never seen the contract between the city and the Construction Company and knew nothing of its provisions (196). On June 18, 1920, he wired J. E. Blain, calling his attention to some provisions of the contract and showing that he knew its contents (203). When asked concerning the authorship of the resolutions, he said he presumed the city officials prepared them. Yet we find that he agreed to furnish the legal proceedings and that his attorneys, Harris, McCall & Graham, did so. The manner in which these resolutions and false affidavits were prepared at Dallas by Harris, McCall & Graham and brought to Gainesville and presented to the council by J. E. Blain is fully explained on page 193 of the record. J. E. Blain was the agent of the Investment Company, representing it in the purchase of the warrants. Notice to the agent is notice to the buyer. There could be no question that J. E. Blain knew that the paving had not been done. Notice to the attorney of the buyer is

notice to the buyer. Harris, McCall & Graham evidently knew that the paving had not been done at the time of the issuance of the warrants and that the warrants were being illegally issued. If J. E. Blain and Harris, McCall & Graham did not know the real facts, why were they not produced as witnesses? The failure of the Investment Company to produce its agent and attorneys, through whom it acquired the warrants, gives rise to an unfavorable presumption. The changes made by Harris, McCall & Graham in an ordinance after it had been enacted and approved indicates that they were indifferent as to the real facts provided everything was fair upon its face. The Investment Company was not expecting to hold the warrants, but to sell. It was supposed the buyer would be, they thought, protected by the recitals and affidavits. A city cannot be estopped by an affidavit made by one of its aldermen, for it is not part of his duties to make an affidavit. When a thing is overdone, it gives just ground for suspicion. If the paving had been done and the money was due, affidavits would not have been thought of. In other words, the estoppel was sought to be created by the parties who knew that the recitals were false and the money was not due. The Investment Company wrote suggesting that, in advance of the work, the warrants should be issued and placed in the bank at Wichita, Kans. When we bear in mind that warrant cannot be issued until the claim is audited and allowed, it is evident that the Investment Company knew that false recitals would be necessary to give to the proceedings the appearance of validity.

Anything is a fraud where a false recital has to be spread upon the records to create the appearance of validity. The opinion cites W. L. Slayton & Co. *vs.* Panola County, 283 Fed., 330. In that case one J. L. Arlitt combined with the county commissioners and others to defraud the county, and caused renewal warrants to be issued to Arlitt for $160,000 when nothing was due. These warrants were issued in lieu of warrants which never existed. Arlitt sold the warrants to Slayton & Co. for $159,000; $15,000 of this money never reached the county treasury, but was doubtless paid to Arlitt and others for perpetrating the fraud. The warrants, in any event, could have been defeated in the hands of Arlitt, for he originated the scheme. If the resolutions had been prepared by the city officials, the names of the aldermen and the date of the session would not have been left blank, nor would a carbon copy have been used instead of the original. The resolutions were prepared by someone who did not know the names of the aldermen nor the time of the session. This was all shown on the face of the papers that Crummer had, and he had had enough correspondence with Harris, McCall & Graham to be familiar with their typewriter.

The warrants in question are in the hands of the Investment Company, whose agents originated the scheme, prepared the papers and endeavored to make everything appear fair upon the records, when it was well known that the paving had not been done and nothing was due. The Investment Company, by way of discount and interest earned before they acquired the warrants, received $8,000 for this job, while Arlitt

received $15,000 for his job. That case is certainly not to be commended.

There are some other cases cited in the opinion where similar frauds were perpetrated. In some of them Arlitt figured and in others Crummer. These cases indicate that they are men engaged in the business of framing estoppels and teaching aldermen and county commissioners how to evade the law.

Mr. Crummer's testimony was discredited in many respects. The evidence shows that the agent and attorneys of the Investment Company knew that the work had not been done and a fraud was being perpetrated. The Investment Company was afraid to produce its agent and attorneys, for they would be forced to admit that the warrants were for paving that had never been done. A warrant cannot be issued except for work really done. The city of Gainesville was entitled to have the issue submitted to the jury. Neither the district court nor the circuit court of appeals can, under the Constitution, deprive the city of that right.

The suit had been pending for years. Mr. Crummer, if he did not already know, had time to investigate, and doubtless did investigate. Yet he failed to produce his agent and attorneys and presumed that the city officials prepared the resolutions. A jury did not have to believe him.

Respectfully submitted,

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